No. 82-1230



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

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UNITED STATES OF AMERICA,
Plaintiff/Respondent

v.

D.C. COAL COMPANY, INC.,
JULIAN H. CREWS and CLARENCE
MOORE, individually and d/b/a
D.C. COAL COMPANY,
Defendants.

CLARENCE MOORE,
Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 21, 1983

## QUESTION PRESENTED

Whether the District Court and Court of Appeals erred in granting a summary disposition in the face of the applicable standards for ruling on such matters and due to the serious questions raised regarding the government's failure to comply with statutory and due process requirements.

**Parties Petitioner:**

Clarence Moore

**Parties Respondent:**

United States of America

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## TABLE OF AUTHORITIES

CASES

## REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF LOWER COURT OPINIONS[1]

The Judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, the Honorable Robert L. Taylor, presiding, granting the motion of the United States for judgment on the pleadings was filed on July 10, 1981, (J.A. p. 40). It is unreported to the best knowledge of Petitioner.

On appeal to the United States Court of Appeals for the Sixth Circut, the judgment of the District Court was affirmed by an Order entered on October 27, 1982, which is unreported.

## STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

The Petitioner was found liable for a civil penalty to the United States under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sec. 1201 et seq., by a final decision of a district court, which was appealed to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. Sec. 1291.

The Court of Appeals affirmed the judgment of the District Court by final action in an order entered on October 27, 1982, and the right of appeal is not available in this case. Therefore, Petitioner seeks further review of this case by respectfully requesting the Court to grant this Petition for Writ of Certiorari, which is made pursuant to 28 U.S.C. Sec.

1254(1) and within the time allowed by 28 U.S.C. Sec. 2101(c).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOLVES[2]

United States Constitution

Amendment Five

28 U.S.C. Sec. 1254(1)

28 U.S.C. Sec. 1291

28 U.S.C. Sec. 2101(c)

30 U.S.C. Sec. 1268(b), (c), and (d)

30 U.S.C. Sec. 1271(a)

Rule 12(c) Federal Rules of Civil Procedure

## STATEMENT OF THE CASE

### NATURE OF THE CASE AND COURSE PROCEEDINGS.

The Petition of Clarence Moore arises from the granting of Judgment on the pleadings to the United States of America, Respondent, in the United States District Court for the Eastern District of Tennessee, Northern Division, and the affirmance of the judgment by the Court of Appeals for the Sixth Circuit. The Judgment of the District Court was entered on July 10, 1981, and Petitioner filed a Notice of Appeal on August 6, 1981 (J.A., p. 40, 42). [3]

The judgment of the Court of Appeals affirming the District Court's action was entered on October 27, 1982.

The United States brought this action in the District Court by way of Complaint for civil penalties allegedly

owed by the Petitioner pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 USC Sec. 1201, et seq. (J.A., pp. 3, 5). The civil penalties were allegedly owed to the Secretary of the Interior in accordance with the provisions of 30 USC Sec. 1268 (b) and (c). (J.A., pp. 3, 5). The United States sought penalties in the amount of Thirteen Thousand One Hundred Dollars ($13,100.00). (J.A., p. 6). The Petitioner seeks reversal of the order affirming the District Court's judgment on the pleadings for the United States.

The original complaint was filed by the United States against "D.C. Coal Company" on February 3, 1981. (J.A., pp. 3,5). This Complaint was later amended on February 25, 1981, to substitute Julian H. Crews, and the Petitioner, Clarence Moore, individually, d/b/a D.C. Coal Company,

Inc., for the original Defendant. (J.A., p. 19).

The United States moved for judgment on the pleadings on May 29, 1981, after filing with the District Court on the same day a letter addressed to the United States Attorney, Mr. Richard K. Harris, Assistant United States Attorney, and labelled as Petitioner's "Answer". (J.A., pp. 21, 22). The Petitioner filed a true Answer to the Complaint, and an Affidavit on July 2, 1981, as well as a Response to the United States' Motion for Judgment on the Pleadings and a Memorandum in opposition thereto. (J.A., pp. 24, 31, 32 and 34).

On July 8, 1981, the Honorable Robert L. Taylor, presiding, heard oral argument on the United States' Motion for Judgment on the pleadings and granted such motion. (J.A., p. 43).

A Judgment granting such motion was formally entered on July 10, 1981. (J.A., p. 40).

On August 6, 1981, Petitioner filed a Notice of Appeal. (J.A., p. 42).

The Court of Appeals affirmed the Judgment of the District Court on October 27, 1982.

## STATEMENT OF THE FACTS[4]

On Feburary 3, 1981, the United States filed a Complaint for collection of penalties allegedly owed pursuant to 30 USC Sec. 1268(d) of the Surface Mining Control and Reclamation Act of 1977, 30 USC Sec. 1201 et seq., against "D.C. Coal Company, Inc.". The United States alleged that D.C. Coal Company, Inc., owed civil penalties in accordance with the provisions of 30 USC Sec. 1268(b) and (c). (J.A., pp. 3, 5).

The United States amended its Complaint on February 25, 1981, substituting "Julian H. Crews and Clarence Moore, individually, and d/b/a D.C. Coal Company, Inc.," as Defendants in place of D.C. Coal Company, Inc. (J.A., p. 19).

The Complaint of the United States as amended alleged that the Defendants operated a surface mining and

reclamation operation in Campbell County, Tennessee. (J.A., p. 5).

The Complaint alleged that "following the issuance of Notice of Violation 79-2-11-15, against Defendant pursuant to 30 USC Sec. 1271(a)(3), the Secretary of the Interior sent to Defendant, a proposed assessment of civil penalty on June 6, 1979." (J.A., p. 5). The Complaint alleged that the Defendant failed to pay the amount of the assessment or deposit into escrow the amount of the proposed assessment. (J.A., pp. 5, 6). The Complaint alleged that Defendants had waived all rights to contest the existence of the violation or the amount of the penalty "in this proceeding", due to their failure to pay the assessment or to deposit such amount into escrow. (J.A., p. 6). Finally, the Complaint in Paragraph 6 alleged that the Office of Surface Mining on

August 27, 1979, issued a "Final Order" requiring that the penalty in the amount of Thirteen Thousand One Hundred Dollars ($13,100.00) be paid. (J.A., p. 6).

The Petitioner denied that the alleged Notice of Violation was directed to him and denied that it was ever served on him. (J.A., pp. 24, 25). The Petitioner alleged, therefore, that because he never received notice of such violation, he had not been afforded the right to a public hearing pursuant to the provisions of 30 USC Sec. 1268(b), and further alleged that the opportunity for a public hearing was a condition precedent to the assessment of a civil penalty. (J.A., p. 25).

The Petitioner denied having any connection with the original Defendant, "D.C. Coal Company, Inc.", directly or indirectly. (J.A., p. 24). Petitioner also alleged that there had

never been a "Final Order" to pay the assessment as to him, and that the "Final Order" was directed to "Dude Crews/D.C. Coal Company." (J.A., p. 25).

The Affidavit of the Petitioner reiterated many of the allegations contained in his Answer. (J.A., pp. 34, 35). The Petitioner stated that he was not familiar with the original Defendant, "D.C. Coal Company", and that his only connection with his Co-Defendant, "Julian H. Crews (Dude Crews)" was that he had leased some equipment to him. (J.A., pp. 4, 5).

Petitioner stated that he had not engaged in mining activities with his Co-Defendant, Julian H. Crews, and had not engaged in any mining activities on the mine site in question. (J.A., pp. 34, 35).

Petitioner denied that he

received Notice of Violation 79-2-11-15 and stated that said Notice of Violation, which was the basis for the civil penalty proceeding, was not even addressed to him. (J.A., pp. 34, 35).

The United States late in District Court proceedings produced a document entitled "Modification of Notice or Order". (J.A., p. 41). The document was filed by Order of the Court as part of the Judgment, and as an exhibit to the United States' Complaint. The document purported to be a modification of the original Notice of Violation and Order of Cessation, thus, naming "Dude Crews/D.C. Coal Company and Clarence Moore" as the parties responsible for the violations cited. (J.A., p. 41).

However, there was no evidence presented to show that this document had been served upon Petitioner, Clarence

Moore.

## ARGUMENT

THE DISTRICT COURT AND COURT OF APPEALS ERRED IN GRANTING JUDGMENT TO THE UNITED STATES, IN LIGHT OF THE REQUIREMENTS OF DUE PROCESS, THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, 30 USC SEC. 1201, ET SEQ., AND CONSTRUCTION OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Petitioner respectfully submits that the lower courts failed to follow the established standards for ruling on motions for judgment on the pleadings and motions for summary judgment. This case initially came before the District Court on the United States' Motion for Judgment on the Pleadings. However, because matters outside the pleadings were considered, i.e., the purported modification of the initial Notice of Violation, the matter was converted into a Motion for Summary Judgment. See Rule 12(c) of the Federal Rules of Civil Procedure.

In reviewing the District Court's action, whether viewed as a

disposition of a motion for judgment on the pleadings or as a motion for summary judgment, the Court of Appeals failed to adhere to its own standards for reviewing such matters.

The Sixth Circuit Court of Appeals recognizes that in ruling on a motion for judgment on the pleadings all well pleaded material allegations of the non-moving party must be taken as true. See, Southern Ohio Bank v. Merrill Lynch, Pierce and Finner, Inc., 479 F. 2d 478 (6th Cir. 1973).

Likewise, in considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party opposing the motion. New Jersey Life Insurance Company v. Getz, 622 F. 2d 198 (6th Cir. 1980). Further, on review, the Court of Appeals must do the same. Id. at 200.

Considering the allegations of

Petitioner in his Answer and in his sworn Affidavit, material questions of fact were raised, and the United States clearly was not entitled to judgment as a matter of law. Recounting the material factual issues raised by the Petitioner:

> 1. Petitioner denied having any connection with the original Defendant, D.C. Coal Company, Inc., directly or indirectly.
> 2. Petitioner denied any connection with the Co-Defendant, Julian H. Crews, except he admitted entering into a lease with him for certain mining equipment.
> 3. Petitioner also denied receiving Notice of Violation No. 79-2-11-15 and denied that the Notice of Violation was ever addressed to him. Petitioner also denied that he had been afforded a right to a public hearing. Petitioner also denied that final order of assessment of a penalty had ever been issued as to him.

(J.A., pp. 24 through 25 and pp. 34 through 35). The aforementioned allegations, singularly and combined, raised material issues of fact as to

whether or not the Petitioner had received notice of the violation upon which the United States sought to collect a Civil Penalty, whether Petitioner had in fact been involved with the original Defendant or Co-Defendant in the complained of mining activities; and whether the United States had complied with the Surface Mining Control and Reclamation Act of 1977, 30 USC Sec. 1201 et. seq., in assessing the alleged penalty.

The United States filed no Affidavits in this cause. The sole Affidavit before the District Court was the Affidavit of Petitioner. The United States produced a document at the end of proceedings in District Court entitled "Modification of Notice of Hearing", presumably to show the Court that proper notice had been given to the Petitioner regarding the Notice of Violation.

(J.A., p. 41).

However, such an unverified document, produced near the termination of proceedings and absent any proof of service should be insufficient to overcome the material issues of fact raised by Petitioner and the standards governing the dispositions of motions for judgments on the pleadings and motions for summary judgment.

Therefore, viewing the evidence in the light most favorable to Petitioner, there was never "a notice or order charging that a violation of the Act has occurred...", as required by 30 USC Sec. 1268(c). The Secretary, therefore, was acting without authority in assessing a civil penalty against the Petitioner, because without notice of an underlying violation, the Petitioner could not avail himself of an opportunity for a public hearing, which

is a condition precedent to the assessment of a civil penalty under 30 USC Sec. 1268(b).

It is a basic principle of law that an administrative agency only has such powers as are conferred upon it by law and that such an agency must conform to the requirements of the statutes delegating a power, as well as the constitution, or it is without authority to act. See, e.g., Social Security Board v. Nierotko, 327 US 358; United States v. Carolina Freight Carriers Corp.; United States v. Chicago, M. St. P. & P. R. Company, 282 US 311.

The right to notification that one's rights are subject to modification or deprivation has been the "central meaning of procedural due process". Shevin v. Fuentes, 407 US 67, 80, (1972).

In addition to the requirements

of due process, the Surface Mining Control and Reclamation Act of 1977 requires that notice must be given to an operator before a penalty is assessed. Therefore, the United States violated both due process and statutory requirements in assessing and attempting to collect a civil penalty in this case.

Adequate notice of suit is required by due process. World-Wide Volkswagen Corp. v. Woodson, 444 US 286, 291 (1980). "A Judgment rendered in violation of due process is void...." Id. Thus, in the context of this case, the civil penalty collection action brought by the United States was an attempt to make binding an order which was void because it was based on a violation for which the Petitioner never received notice.

Petitioner, therefore, was not aware that an alleged violation had

occurred, that he was alledgedly cited for such violation, and that he should protect his interest by resorting to administrative remedies as provided in the Surface Mining Control and Reclamation Act.

The full range of procedural safeguards contained in the penalty and enforcement provisions of the act, 30 USC Sec. 1268 and Sec. 1271, are meaningless unless notice of violation is given first. It seems clear that the multiple steps, in toto, available to an aggrieved operator to contest the violation and the amount of a penalty are what has saved 30 USC Sec. 1268(c) from constitutional attack. See e.g. United States v. Hill, 533 F. Supp. 810 (E.D. Tenn. 1982). In the Hill decision, supra, and other decisions upholding the constitutionality of the penalty provisions of the Act, the

sufficiency of notice was not questioned. Therefore, this case presents a new issue for review.

Without initial notification of a violation, the full array of procedural safeguards are unavailable to an aggrieved operator. A civil penalty assessed under such circumstances would raise grave doubts as to the constitutionality of the Act as applied. See, Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 US 264, 304 (1981). Further, a civil penalty assessed upon a violation which is vacated is void and uncollectable. Little Bird Coal Co., Inc., 88 ID 503 (1981). In this case, the violation insofar as it purports to bind the Petitioner to civil penalty liability under the Act is a nullity, and the action by the United States to collect such penalty cannot be maintained.

An operator who has been denied an opportunity to resort to the available administrative remedies under the Act subsequent to a violation, because he or she was not notified of the existence of such violation, has been denied due process of the law. See, Memphis Light, Gas & Water Division v. Craft, 436 US 1, 14, 15, (1978).

In the normal course of civil litigation, due process is violated when a judgment is made binding on a litigant which is not a party or privy in the prior suit and, therefore, has never had an opportunity to be heard. Parklane Hoisery Company v. Shore, 439 US 322, 327, n. 7, (1979). Similarly, an operator who is assessed a civil penalty for a violation in which he was neither involved nor received notice is deprived of due process when a final order of payment is urged upon him as binding in

a civil penalty collection suit, as is the instant case.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that genuine material issues of fact were raised in the lower court which precluded the granting of judgment on the pleadings or summary judgment in favor of the United States under the standards set down by the Sixth Circuit, and serious questions are present as to the compliance of the United States with requirements under the Act and the requirements of due process as interpreted by the Court.

Petitioner, therefore, respectfully requests the Court to review the judgment of the Court of Appeals, this the 21st day of January, 1983.

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## FOOTNOTES

[1] Copies of lower court reports are reproduced in the Appendix.

[2] Pertinent text is set forth in the Appendix.

[3] References are to pages of the Joint Appendix filed by Petitioner and the United States in Case No. 81-5562 in the Court of Appeals, Sixth Circuit.

[4] The facts set forth rely primarily upon the pleadings in District Court due to the absence of a fully developed record because of the summary disposition of the case.

# APPENDIX

## INDEX TO APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

ACTION NO.
CIV. 3-81-60

UNITED STATES OF AMERICA

PLAINTIFF

V.

JULIAN H. CREWS, and CLARENCE MOORE, individually and d/b/a DC Coal Company,

DEFENDANTS

JUDGMENT

This matter came on for a hearing before the Court on the motion of plaintiff for judgment on th pleadings; and the Court having considered the pleadings and exhibits, along with the affidavit submitted by defendant Moore, having heard the arguments of counsel, and being sufficiently advised,

IT IS THEREFORE ORDERED AND ADJUDGED:

1. That the document entitled "Modification of Notice or Order," dated May 14, 1979, shall be filed as an additional exhibit to the complaint herein.

2. That plaintiff recover of the defendants, Julian H. Crews and Clarence Moore, the sum of $13,100.00 with interest thereon at the rate of eight (8) per cent per annum from the date of this judgment, together with the costs of this action.

/s/ Robert Taylor
UNITED STATES DISTRICT JUDGE

Approved:

JOHN H. CARY
UNITED STATES ATTORNEY

/s/By:J. Michael Haynes
Assistant U.S. Attorney

NO. 81-5562

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DC COAL COMPANY, INC., et al.,

Defendants,

and

CLARENCE MOORE,

Defendant-Appellant.

ORDER

BEFORE: EDWARDS, Chief Circuit Judge, JONES, Circuit Judge and CELEBREZZE, Senior Circuit Judge.

Defendant-appellant, Clarence Moore, appeals from an order of the district court granting judgment on the pleadings in favor of the plaintiff-appellee, the U.S. Government.

The Office of Surface mining

("OSM") filed this action against Moore in February 3, 1981. The complaint was for civil penalties in the amount of $13,100.00 allegedly owed pursuant to Sec. 1268 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sec. 1201, et seq. (the Act). Moore first responded by way of a letter which was filed by the OSM as his apparent answer on May 29, 1981. That same day OSM moved for a judgment on the pleadings. A formal answer was then filed by Moore on July 2, 1981 accompanied by an affidavit, a response to the motion for judgment on the pleadings, and a memorandum in opposition to the motion. The court entertained the motion as one for summary judgment and, following a hearing on the matter, entered judgment in favor of the government.

Upon consideration of the

record as a whole, viewing the evidence in the light most favorable to the appellant, this Court has determined that the district court did not err in granting judgment in favor of the government at this stage. There exists no genuine issue of fact material to the application of the Act to this action. An examination of the statutory scheme in the context of the uncontroverted facts on the record before this Court reveals that the government is entitled to judgment as a matter of law. The grant of summary judgment is appropriate in such cases. Rule 56, Fed. R. Civ. P.

Accordingly, the judgment of the district court is hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT.

/s/John P. Hehman
CLERK

## CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment 5

**Criminal actions--Provisions concerning--Due process of law and just compensation clauses.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**28 U.S.C. Sec. 1254. Court of appeals; certiorari; appeal; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at te instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

**28 U.S.C. Sec. 1291. Final decisions of district courts**

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

**28 U.S.C. Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay**

(a) ...

(b) ...

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period of not exceeding sixty days.

(d) ...

(e) ...

(f) ....

**30 U.S.C. Sec. 1268. Penalties**

(a) ...

**(b) Hearing.** A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing. Where such a public hearing has been held, the Secretary shall make findings of fact, and he shall issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, and order therein requiring that the penalty be paid. When appropriate, the Secretary shall consolidate such hearings with other proceedings under section 521 of this Act. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. Where the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Secretary after the Secretary has determined that a violation did occur, and the amount of the penalty which is warranted, and has issued an order requiring that the penalty be paid.

**(c) Notice; waiver.** Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the

person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

**(d) Recovery in civil action.** Civil penalties owed under this Act, may be recovered in a civil action brought by the Attorney General at the request of the Secretary in any appropriate district court of the United States.

(e) ...

(f) ...

(g) ...

(h) ...

(i) ....

**30 U.S.C. Sec. 1271. Enforcement.**

**(a) Notice; Federal inspection; waiver; cessation order; affirmative obligations; hearing; suspension or revocation of permits; contents of notices and orders; expiration date.** (1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the

inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cesstion of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

(3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days from the abatement of the violation and providing opportunity for public hearing.

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cesation order shall remain in effect until the Secretary or his authorized representative determines that the violation has been abated, or until modified, vacated, or terminated by the Sectetary or his authorized representative pursuant to subparagraph

(a)(5) of this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures in the order.

(4) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502 or section 504 or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authoried representative also find that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a hearing is requested the Secretary shall inform all interested parties of the time and place of the hearing. Upon the permitte's failure to show cause as to why the permit should not be suspended or revoked, the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

(5) Notices and orders issued

to this section shall set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies. Each notice or order issued under this section shall be given promptly to the permittee or his agent by the Secretary or his authorized representative who issues such notice or order, and all such notices and orders shall be in writing and shall be signed by such authorized representatives. Any notice or order issued pursuant to this section may be modified, vacated, or terminated by the Secretary or his authorized representative. A copy of any such order or notice shall be sent to the State regulatory authority in the State in which the violation occurs: Provided, That any notice or order issued pursuant to this section which requires cessation of mining by the operator shall expire within thirty days of actual notice the operator unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of the public hearing.

(b) ...

(c) ...

(d) ...

Federal Rules of Civil Procedure

**Rule 12. Defenes and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on Pleadings**

(a) ...

(b) ...

**(c) Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) ...

(e) ...

(f) ...

(g) ...

(h) ....

## CERTIFICATE

I, David A. Burkhalter, II, a member of the Bar of the Court, pursuant to Supreme Court Rule 19 and Rule 28, hereby certify that I have served Robert S. More, Special Assistant U.S. Attorney, Department of the Interior, P. O. Box 15006, Knoxville, TN 37901, and the Solicitor General, Department of Justice, Washington, D.C., 20530, with three (3) true and exact copies of the foregoing Petition and filed with the Court forty (40) true and exact copies, properly addressed to the Clerk of the Court, by depositing same in a United States Post office, first-class postage pre-paid, this the 21st day of Januarary, 1983.

David A. Burkhalter, II

STATE OF TENNESSEE
COUNTY OF KNOX

SUBSCRIBED and sworn to before me this the 21st day of January, 1983.

Notary Public
My Commission Expires: 7/23/84

No. 82-1230

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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CLARENCE MOORE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether the district court properly granted summary judgment in an action for collection of civil penalties for violations of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. V) 1201 *et seq.*, against a mine operator who had been served with a notice of proposed assessment of the penalties, but failed to utilize the available administrative remedies for challenging the assessed penalties.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The order of the court of appeals (Pet. App. 30-32) is not reported. The judgment order of the district court (Pet. App. 27-29) also is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on October 27, 1982. The petition for a writ of certiorari was filed on January 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. On May 11, 1979, inspectors of the Department of the Interior's Office of Surface Mining ("OSM") discovered an open pit and mining equipment on a site in Campbell County, Tennessee. Believing that the mining operation was being conducted by Julian H. ("Dude") Crews, OSM

officials issued a cessation order to Crews for opening or developing a new surface coal mining operation without obtaining a state permit, in violation of Section 502(a) of the Surface Control and Reclamation Act of 1977 ("Surface Mining Act"), 30 U.S.C. (Supp. V) 1252(a). A notice of four other violations of the Act and the implementing regulations also was issued on that date, and the operator was directed to take remedial action to bring the site into compliance with federal law. J.A. 7-8.[1] A few days later, on May 14, 1979, OSM officials learned that petitioner also was involved in the mining operation. Accordingly, the cessation order and notice of violation were modified on that date to include petitioner. J.A. 41.[2]

On June 6, 1979, pursuant to Section 518 of the Surface Mining Act, 30 U.S.C. (Supp. V) 1268, and 30 C.F.R. 723.16(b), OSM sent a notice of a proposed assessment of civil penalties, together with an accompanying copy of a worksheet showing the computation of the proposed assessed penalties in the amount of $13,100, to petitioner and Crews. J.A. 9-14. The notice of proposed assessment, which referred to the previously issued notice of violation, stated, among other things, that "THE PROPOSED PENALTY WILL BECOME FINAL AND PAYABLE WITHIN 30 DAYS from the date you received this letter UNLESS YOU REQUEST A CONFERENCE OR HEARING * * *." J.A. 9. This statement was followed by detailed instructions advising petitioner and Crews how their rights to an informal conference or a formal hearing or both could be pursued, including a warning that, if they did not make conditional payment of the assessed penalty into an escrow

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[1] "J.A." references are to the joint appendix filed in the court of appeals.

[2] The record in the courts below does not disclose whether the modified cessation order and notice of violation were served upon petitioner.

account, they could forfeit their right to a hearing. J.A. 9-10; see also page 5, *infra*. Although petitioner admitted receipt of the notice of proposed assessment (J.A. 21), he did not request any conference or hearing nor did he pay the assessed penalty.

2. Notwithstanding additional notices and orders by OSM, neither petitioner nor Crews made any effective attempt to remedy the violations. Accordingly, on March 12, 1980, the United States brought a civil action in the United States District Court for the Eastern District of Tennessee, seeking an order restraining them from further operation of the mine in violation of federal law and compelling them to restore the site. The district court, noting that the defendants had "conceded their responsibility for the mine site in question," entered a permanent injunction granting the government the requested relief. *United States* v. *Julian H. Crews and Clarence Moore*, Civil Action No. 3-80-100 (Apr. 18, 1980) (the order granting a permanent injunction is reproduced as an addendum to the United States' brief in the court of appeals).

3. The United States filed the instant action on February 3, 1981, this time seeking to collect the unpaid penalties that had been assessed against petitioner and Crews. J.A. 4-6.[3] Petitioner failed to file a timely answer to the complaint; instead, by letter to the United States Attorney dated March 12, 1981, he generally disclaimed responsibility for the violations and asserted that the assessed penalties were excessive. J.A. 21. He further stated (*ibid.*; emphasis in original), however, that "[t]he violations and *proposed* assessments were mailed to me and received by Pam Mason

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[3]The complaint as originally filed named only DC Coal Co., Inc., as a defendant. On February 25, 1981, the government amended its complaint to substitute as defendants petitioner and Crews, individually and d/b/a DC Coal Company. J.A. 19.

at my field office in Newcomb as shown in documents attached to the complaint." The government filed the letter in the district court proceedings with a request that it be treated as petitioner's answer and moved for judgment on the pleadings. J.A. 22-23.

After the court had scheduled a hearing on the government's motion, petitioner filed a formal answer in which he disclaimed all responsibility for the violations at the site. J.A. 24-27. Petitioner also denied receiving a copy of the notice of violation and claimed that he had been deprived of his rights to a hearing. J.A. 24-25. Petitioner, however, admitted that he had never paid the assessed civil penalty. J.A. 25. Moreover, during the hearing before the district court, petitioner, through his counsel, admitted that he had been served with the notice of proposed assessment of the civil penalty. J.A. 47-49.[4]

The district court, treating the government's motion for judgment on the pleadings as a motion for summary judgment, entered judgment in favor of the United States (Pet. App. 27-28). The court of appeals affirmed (*id.* at 30-32).

## ARGUMENT

Section 518 of the Surface Mining Act, 30 U.S.C. (Supp. V) 1268, prescribes the manner for assessing civil penalties for violations of the Act. Section 518(a), 30 U.S.C. (Supp. V) 1268(a), provides that the Secretary may assess civil penalties for violations of the Act (and shall assess such penalties where a cessation order has been issued), not to exceed $5,000 for each violation. Such penalties may be assessed "only after the person charged with a violation

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[4]Petitioner supported the allegations contained in his answer with his own affidavit, which stated (J.A. 34), *inter alia*, that he had never received the notice of violation or the final order from OSM stating that the proposed assessment of the penalties had become final.

* * * has been given an opportunity for a public hearing," which "shall be of record and shall be subject to section 554 of title 5." Section 518(b), 30 U.S.C. (Supp. V) 1268(b). The critical provision for purposes of this case is Section 518(c), 30 U.S.C. (Supp. V) 1268(c), which provides that, within 30 days of the issuance of a notice or order charging a violation, the Secretary shall inform the operator of the proposed amount of the penalty, and that "[t]he person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account." Should the operator prevail in whole or in part in the administrative proceedings or on judicial review, the deposited funds or the appropriate part of them must be returned with interest. *Ibid.* "Failure to forward the money to the Secretary within thirty days," however, "shall result in a waiver of all legal rights to contest the violation or the amount of the penalty." *Ibid.*[5]

Petitioner, relying on his alleged failure to receive either a copy of the notice of violation or the final order confirming the proposed assessment of the penalties, contends (Pet. 11-21) that he was denied his rights under the Due Process Clause of the Fifth Amendment and the Surface Mining Act, and, consequently, that the district court erred in entering summary judgment against him. This claim is baseless. Furthermore, the decision of the court of appeals affirming

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[5]The Secretary's regulations implementing Section 518(c) substantially track the language of the statute and provide that a person charged with a violation may contest the proposed penalty or fact of violation at a formal evidentiary hearing by submitting a petition requesting a hearing and an amount equal to the amount of the proposed penalty. 30 C.F.R. 723.19. In addition, upon request, an operator will be entitled to an informal conference concerning the proposed assessment without making any deposit. 30 C.F.R. 723.18.

the district court's entry of summary judgment in favor of the United States does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. While petitioner insists that he was never served with copies of the notice of violation or final order, he studiously avoids mentioning the notice of the proposed assessment, which he admitted receiving and which, as described above (pages 2-3, *supra*), expressly informed him that the proposed assessed penalty would become final in 30 days unless he requested review and that his failure to pay the assessed amount could result in the forfeiture of his right to a hearing. Despite this unequivocal notice, petitioner neither paid the proposed assessed penalty nor attempted to pursue his rights to a hearing. To the contrary, petitioner simply ignored the notice of the proposed assessment until the United States instituted this collection action. Hence, petitioner's assertion that there remains a material issue of fact in the district court concerning whether he received adequate notice of the proposed assessed penalty is without foundation. Petitioner admittedly received the notice of the proposed assessment, which expressly advised him of his opportunity to be heard "at a meaningful time in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), and that the proposed assessment would become final if he neglected to take advantage of that opportunity.

Petitioner thus was given notice reasonably calculated to apprise him of the pending action against him and he was afforded an opportunity to present his objections. In these circumstances, due process requires no more. See *Schroeder* v. *City of New York*, 371 U.S. 208, 211 (1962); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

2. Nor does OSM's alleged failure to serve petitioner with copies of the notice of violation or final order amount to inadequate notice of the assessment of civil penalties under the statute. Section 518 of the Act, 30 U.S.C. (Supp. V) 1268, does not make service of a notice of a violation a prerequisite to assessing a civil penalty. Rather, what was done here is precisely what the statute requires (30 U.S.C. (Supp. V) 1268(c)): "the Secretary * * * inform[ed] the operator within thirty days [of the notice of violation] of the proposed amount of [the] penalty." That notice, which petitioner admittedly received, advised him of the procedures available to challenge the fact of violation or the amount of penalty and that, if he failed to take advantage of those procedures, the proposed assessment would become final.

The final order merely confirmed that the proposed assessment had indeed become final by operation of law when petitioner failed to request review. Hence, petitioner lost nothing by the alleged failure to serve the final order upon him.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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